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Legal accountability of European Central Bank in bank supervision: A case study in conceptualising the legal effects of Union acts

Alexander Türk and Napoleon Xanthoulis*

Abstract

This contribution offers a conceptual framework, which allows a clear and transparent assessment of the legal/judicial accountability of acts adopted within the Single Supervisory Mechanism (SSM) based on an evaluation of their legal effects. It shows, that the Union courts are the relevant judicial forum to hold the European Central Bank (ECB) to account for acts, which have primary legal effects, that is all acts or omissions which, directly or indirectly, are capable of determining rights or imposing obligations. Such acts can be challenged by way of direct actions under Articles 263 and 265 TFEU. Where the change in the legal position of a person is caused by at least two distinct acts, the former providing the basis for the adoption of the latter binding act without having itself primary legal effect, then the Union courts may review the former act only indirectly, such as via Articles 267 and 277 TFEU. The judicial accountability mechanisms within the SSM mirror the allocation of competences between the national authorities and the ECB within the SSM by providing for a separate but integrated system of judicial review.

Keywords

European Central Bank, accountability, judicial review, Single Supervisory Mechanism, legal effects, European Banking Union

1. Introduction

The oversight of central banks has always attracted the attention of scholarly literature.¹ Their widely accepted independent status, rendered any attempt to design mechanisms of political and judicial control a difficult task. For it is far from easy to strike an appropriate balance between the need to hold a public authority accountable for the exercise of its conferred powers and enforce its compliance with the rule of law, while at the same time guaranteeing the efficient and impartial exercise of its mandate, particularly where the latter has a constitutional basis, as is the case of the European Central Bank (ECB).²

In the absence of a uniformly accepted definition, the literature attributes diverse objectives and rationales to accountability, in the light of the theoretical underpinnings endorsed by the

* Alexander Türk, Professor of Law, King's College London; Napoleon Xanthoulis, Lecturer in Law, University of Portsmouth. This article summarises some of the findings contained in a report prepared by the authors for a project funded by the ECB Legal Research Programme 2017. We would like to thank the editors of this special issue, the anonymous reviewers at the ECB as well as the participants of the CERiM Workshop on 'The ECB's accountability in a multilevel European order', 29 May 2018, Brussels for their comments on earlier versions of this work.

¹ See e.g. L. Gormley and J. De Haan, 'The democratic deficit of the European Central Bank', 21 *European Law Review* (1996), p. 95-112; F. Amtenbrink, *The democratic accountability of central banks. A comparative study of the European Central Bank* (Hart, 1999); D. Curtin, 'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency' 23(1-2) *European Law Journal* (2017), p. 28-44.

² See *inter alia* C. Zilioli, 'Accountability and Independence, Irreconcilable Values or Complementary Instruments for Democracy – The Specific Case of the European Central Bank', in G. Vandersanden (ed.), *Mélanges en hommage à Jean-Victor Louis Vol. 2* (Editions of Université de Bruxelles, 2003), p. 395-422.

respective author. By reading accountability, in broad terms, as the exercise of (*ex post*) control over the power conferred on public authorities, part of the literature finds a conceptual link between accountability and legal liability. Ter Kuile,³ for example, classifies accountability according to the forum to which a public authority accounts, namely ‘political’, ‘social’ and ‘judicial’. Under this lens, liability in law is seen as an expression or a type of accountability of public authorities, meaning the instance of being accountable to the judiciary. For the purposes of this paper, the terms legal/judicial liability and accountability should be read interchangeably.

It is clear from the provisions of the Treaty that the drafters considered that the guarantee of independence for the ECB should not go as far as granting legal impunity in the exercise of its mandate. The evolution of the ECB in terms of its conferred objectives and function has increasingly extended the accountability debate from monetary policy towards its involvement in the European Stability Mechanism⁴ and lately in prudential supervision.⁵ Yet, there is still much uncertainty about important aspects that touch upon both the substance of judicial control and admissibility of legal actions. In particular, paramount questions pertaining to the justiciability of ECB acts have been left in the periphery.⁶ In this article, we aim to redress this situation by examining the legal effects that trigger the various mechanisms of judicial control of ECB acts.

Providing more clarity on the legal effects of ECB acts is not only important for judicial protection and the rule of law but also for political accountability purposes. By understanding the legal consequences resulting from the allocation of power amongst the various national and Union actors, accountability can better target the exercise of such power and enhance the existing judicial protection mechanisms. Furthermore, it can benefit political and social participants in prioritising their accountability targets and selecting the most appropriate accountability tools.

Reducing the conceptual obscurity of legal effects of acts adopted by Union institutions is essential for the Union’s legal order. It enhances legal certainty and improves the quality of legal enforcement and judicial protection. Moreover, it brings more transparency to the reasoning of Union courts and paves the way for developing the law in a more systematic and coherent manner. Equally, it contributes to a more optimal allocation of resources and regulatory efficiency. By being able to predict with more certainty what kind of legal effects an instrument may produce *vis-à-vis* the various affected parties, Union institutions become better equipped in selecting the most appropriate means in the exercise of their conferred powers. This, in turn, could reduce the circumstances giving rise to a mismatch between the actual effects of Union acts and the apparently intended effects of their authors.

³ G. Ter Kuile, *Of Bills and Rights. Human rights proofing legislation. Comparing the United Kingdom and the Netherlands* (Intersentia, 2013), chs. 9, p. 267 et seq, specifically, p. 298.

⁴ N. Xanthoulis, ‘ESM, Union Institutions and EU Treaties: A Symbiotic Relationship’, 1 *International Journal for Financial Services* (2017), p. 21-33.

⁵ See *inter alia* C.Zilioli, ‘The Independence of the European Central Bank and Its New Banking Supervisory Competences’ in D. Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, (OUP, 2016), p. 125-179; G. Ter Kuile et al., ‘Wissink, Willem Bovenschen, ‘Tailor-made accountability within the Single Supervisory Mechanism’ 55 *Common Market Law Review* (2015), p. 155-190.

⁶ C. Zilioli, ‘Justiciability of central banks’ decisions and the imperative to respect fundamental rights’ in *Proceedings of the ECB Legal Conference 2017*, 4-5 September 2017, Frankfurt (ECB, December 2017), p. 91-103.

The article will proceed as follows: after presenting a conceptual framework for ‘legal effects’ of Union acts more generally (section two), we apply this framework to determine the legal effects of acts adopted by the ECB in the field of bank supervision (section three). Bank supervision works well as a paradigmatic case study not only due to the increasing litigation but also due to the multiplicity of institutional actors and legal instruments involved in this policy area.

2. Conceptual orientations

2.1. The need for conceptual clarity

Union courts determine the reviewability of acts of Union institutions on the basis of a substantive approach. The definition of a reviewable act was first recorded in the *ERTA* case, where the Court held that an action for annulment is available against ‘all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects’.⁷ In *IBM*, the Court explained that such legal effects occur, when the measure is ‘binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position’.⁸ The *IBM* definition of legal effects places emphasis on the substance of an act and not its form.⁹ The scope of reviewable acts is therefore considerably wider than the formal instruments laid down in Article 288 TFEU.¹⁰ The underlying concern of the Court is that an assessment purely based on the form of the act would allow the author of the act to avoid judicial review by choosing an atypical form for its actions.¹¹ Conversely though, not every formal act contains sufficiently binding content to be reviewable.

Despite a substantive test having been established for determining the legal effects of Union acts, there is still insufficient clarity about what triggers judicial control over the conduct of Union institutions.¹² This is so for more than one reason, which we can only briefly discuss here. First, the object of the substantive assessment, that is ‘legal effects’, remains relatively unclear in a twofold manner. On the one hand, the case law is inconsistent about the kind of legal effects that can be regarded as capable of triggering a particular avenue for judicial review.¹³ Union courts currently hold two main types of competences that enable them to review the validity of Union acts and omissions. In general terms, such review may be conducted directly via annulment actions (Articles 263(1) and 265 TFEU) and indirectly via preliminary rulings (Article 267 TFEU) and incidental review (Article 277 TFEU). Although it is clear that only Union acts with binding legal force will be reviewable directly, it is somewhat still unknown what legal effects a Union act must produce so that it can fall within the indirect reviewing competences of Union courts. Neither Union courts nor legal scholarship have so far offered a comprehensive conceptual framework for analysing legal effects in Union

⁷ Case 22/70 *Commission v. Council*, EU:C:1971:32, para. 42.

⁸ Case 60/81 *IBM v. Commission*, EU:C:1981:264, para. 9. Also, C-506/13P *Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro v. Commission*, EU:C:2015:562, para. 16.

⁹ *Op. cit.*, para. 9.

¹⁰ Case T-496/11 *United Kingdom v. ECB*, EU:T:2015:133, where the General Court, in para. 31, made it clear that the relevant criteria to be applied for determining the legal effects of an act were the wording, context and substance of the act, as well as the intention of its author,

¹¹ Case T-496/11 *United Kingdom v. ECB*, para. 30.

¹² For an extensive analysis see, Alexander Türk, *Judicial Review in EU Law*, (Elgar, 2010), p. 12-40.

¹³ See Opinion of Advocate General Bobek in Case C-16/16 *Belgium v. Commission*, EU:C:2017:959, para. 69-75.

law.¹⁴ Second, at the same time, the concept of legal effects has been perceived to have conceptual links with other fundamental legal notions, specifically direct concern,¹⁵ individual concern,¹⁶ direct effect¹⁷ and indirect effect.¹⁸ Such a multiple - yet fragmented - use of legal effects inevitably adds another layer of conceptual obscurity. As a result of the casuistic development of case law,¹⁹ it has been difficult to predict with certainty when Union acts can be subject to judicial control and in which judicial forum. Conceptual clarity becomes therefore not only a matter of theoretical interest, but also of practical necessity.

2.2. Conceptual framework

Our conceptual framework for legal effects of Union acts proceeds from the proposition that a person's legal position consists of rights and obligations created within a legal system.²⁰ Any alteration of a person's rights and obligations constitutes therefore a change in a person's legal position. A public act can be said to produce legal effects if, in some way, it is regarded as capable of changing the legal position of a person. Depending on how a public act is linked to and brings about a change in the legal position of a person, we suggest that a distinction can be made between two types of legal effects: (i) primary legal effects and (ii) secondary legal effects.

Primary legal effects encapsulate binding legal effects that arise either (a) directly or (b) indirectly from an act, by imposing obligations or determining rights *vis-à-vis* a person.²¹ On the one hand, binding legal effects arise directly, where it is the public act itself that brings about such a change in a person's legal position. If we consider obligations in EU law, we see that direct legal effects can arise from a Commission act ordering a Member State to recover aid declared incompatible with the internal market.²² Similarly, primary legal effects can come about directly through the determination of rights, meaning via the granting of a right, its modification or denial.²³ Primary legal effects can also arise indirectly, where an act triggers an obligation or determines a right enshrined in other rules or principles of the legal system. Acts or omissions capable of producing primary legal effects, directly or indirectly, are binding acts; as such, they can be subject to an action for annulment under Articles 263 and 265 TFEU

¹⁴ A significant part of the literature has focused its attention on developing new theoretical constructs to analyse the effects of legal norms, with 'soft law' theories being prime representatives of this trend. To the best of our knowledge, however, these theories have not presented a framework that explains what particularly triggers the reviewability of Union acts in EU law and their normative justification. See *inter alia*, O. Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, (Kluwer, 2013); J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', 48 *Common Market Law Review* (2011), p. 329-355.

¹⁵ Opinion of Advocate General Roemer in Case C-25/62 *Plaumann v. Commission*, EU:C:1963:7, para. 114; Opinion of Advocate General Roemer in Case C-1/64 *Glucose series réunies v. Commission*, EU:C:1964:47, para. 421.

¹⁶ Opinion of Advocate General Roemer in Case C-25/62 *Plaumann v. Commission*, para. 115.

¹⁷ Case 41/74 *Van Duyn v. Home Office*, EU:C:1974:133, para. 12. See also, Case C-148/78 *Ratti*, EU:C:1979:110, para. 20-21. M. Bobek, 'The Effects of EU law in the National Legal Systems' in C. Barnard and S. Peers (eds.), *European Union Law* (OUP, 2014).

¹⁸ G. de Búrca, 'Giving Effect to European Community Directives', 55(2) *Modern Law Review* (1992), p. 215-240, 231.

¹⁹ A. Türk, *Judicial Review in EU Law*, (Elgar, 2010), pp. 12-40, particularly 37-40.

²⁰ The scope of this contribution does not permit an elaborate discussion on the definition of rights and obligations in EU law.

²¹ Primary legal effects can be produced not only by positive acts but also omissions by Union institutions. Unlike, positive acts, however, omissions, or failures to act, can give rise only to indirect primary legal effects.

²² See Case C-274/12 *Telefónica v. Commission*, EU:C:2013:852.

²³ Case T-154/10 *France v. Commission*, EU:T:2012:452, para. 40.

respectively. Moreover, their validity can be reviewed by the Court of Justice in the context of preliminary ruling proceedings under Article 267 TFEU and incidentally pursuant to Article 277 TFEU. Finally, they are capable of giving rise to the Union's non-contractual liability under Article 340 TFEU.

Legal effects can however also arise through what we call 'secondary legal effects'. In contrast to primary legal effects, the relevant act does not itself change a person's legal position either directly or indirectly. Rather, this act provides the basis for the adoption of a subsequent act, which produces binding legal effects (primary legal effects) *vis-à-vis* another person. The relationship between the two acts often takes the form of the former authorising or enabling the latter. In such a scenario, the first act is regarded as producing secondary legal effects *vis-à-vis* the person affected by the final act. Secondary legal effects can be distinguished from indirect primary legal effects in that the former entail two acts, specifically, the adoption of a subsequent act with binding legal effects. By contrast, indirect primary legal effects require the existence of a single act that triggers the determination of rights or an obligation of a person, whose source is not the act itself but a different legal provision (hence they arise 'indirectly'). We have seen that acts and omissions producing primary legal effects *vis-à-vis* a person can be reviewed directly by Union courts. By contrast, acts, which have only secondary legal effects are not reviewable acts under Articles 263 and 265 TFEU. Their validity, however, can still be subject to indirect review under Articles 267 and 277 TFEU. Finally, acts with secondary legal effects may also trigger non-contractual liability under Article 340 TFEU.

Not all acts of Union institutions entail legal effects. Union acts or omissions that do not produce legal effects are not reviewable before Union courts either directly (Articles 263 and 265 TFEU) or indirectly (Articles 267 and 277 TFEU). They can, however, potentially give rise to the Union's non-contractual liability under Article 340 TFEU.

An act may simultaneously produce more than one kind of legal effect. An EU Directive directly imposes obligations on Member States, for whom it can therefore be said to produce primary legal effects, while at the same time it produces secondary legal effects for those affected by the national act implementing the Directive. In this case, the Directive is a reviewable act under Article 263 TFEU, as it produces binding (primary) legal effects for the Member States having to implement it. In contrast, a Union act can be addressed to a Member State (but does not impose an obligation for a general or specific action or determine any rights), which then subsequently adopts an act which imposes obligations on a private party. In this case, the Union act does not produce any primary legal effects at all, but 'only' produces secondary legal effects. In this case a direct action is excluded, but an indirect validity review pursuant to Article 267 is possible.

Our proposed taxonomy of legal effects defines the scope of the Union courts' jurisdiction as follows: First, actions for annulment under Articles 263 and 265 TFEU are available only where an act or omission entails primary legal effects. In this case, the Union courts are the main forum to ensure the accountability of the act's author. Second, the Union courts' power to review acts and omission of Union institutions indirectly pursuant to Articles 267 and 277 TFEU covers acts and omissions with primary legal effects and also extends to the ones that produce secondary legal effects. Here, the Union courts still are the exclusive forum to hold the act's author to account, but in case of a validity review via Article 267 TFEU the Court's responsibility as judicial forum is only engaged if and to the extent of a reference from the national court. Finally, a direct action for damages pursuant to Articles 268 and 340(2) TFEU is available for acts and omissions that entail any kind of legal effects, but also those that

produce no legal effects. Again in this case, the Union courts constitute the main forum for such an action.

3. The legal effects of ECB acts in the Single Supervisory Mechanism (SSM)

The remaining part of this contribution is devoted to applying the conceptual framework set out in the previous section to determine the legal effects of selected types of Union acts adopted in the SSM. Before proceeding, it is worth making a note pertaining to the attribution of power in this policy area. Broadly speaking, the SSM is an integrated institutional and regulatory network of Union and national authorities which carry out prudential supervision-related tasks. Since the SSM does not in itself have legal personality, all acts adopted in this context are imputed either to the Union institutions involved or the participating National Competent Authorities (NCAs), depending on whether the relevant competences are placed at Union or national level. We focus our analysis primarily on the legal effects of, selectively chosen, acts adopted by the ECB.

It was mentioned above that Union courts have endorsed a substantive test for determining the reviewability of acts adopted by Union institutions. It follows, that the assessment of the legal effects of any act must always entail a distinct exercise, the outcome of which would depend on the merits of each case. Having said that, it can be relatively easier to identify the possible legal effects of certain types of acts due to their normative function in a legal system. By contrast, other types of acts require a more elaborate analysis before any safe conclusion can be drawn. On this basis, our survey below unfolds by distinguishing between ‘straightforward’ and ‘hard’ cases of ECB acts in terms of the level of complexity (or not) surrounding the assessment of their legal effects.

3.1. Straightforward cases

There is no doubt that Regulations²⁴ adopted by the ECB, irrespective of whether they have specific addressees, such as NCAs,²⁵ or are of general application,²⁶ generally produce primary legal effects and therefore, can be challenged directly before Union courts.

The same applies with respect to decisions²⁷ by which the ECB imposes obligations on or alters rights of other persons, under primary and secondary EU law,²⁸ including decisions imposing sanctions for breach of its regulations. The ECB’s supervisory decisions are prime examples of this type of act. Like Regulations, supervisory decisions may be directed to national authorities, private entities or have general application. The exclusive competence of the ECB, under Articles 4(1) and 6(5) SSM Regulation, with respect to all credit institutions established in the Member States participating in the Banking Union, including the less significant ones, was recently affirmed by the General Court in the *L-bank* case.²⁹ The binding force of ECB decisions can be easily inferred from the right of affected persons to challenge the validity of

²⁴ Articles 33(2), 25(5) and 26(7) SSM Regulation.

²⁵ See e.g. Article 6(5)(a) SSM Regulation.

²⁶ Article 4(3) SSM Regulation.

²⁷ ECB Decision of 23 November 2015 Decision on whether instruments to be issued by National Bank of Greece S.A. (‘the Supervised Entity’) meet the criteria for Common Equity Tier 1 instruments in accordance with Article 31 of Regulation (EU) No 575/2013.

²⁸ Article 18(7) and Recital 36 SSM Regulation making reference to Article 132(3) TFEU and Council Regulation 2532/98.

²⁹ Case T-122/15 *Landeskreditbank Baden-Württemberg v. ECB*, EU:T:2017:337, para. 54-64.

ECB supervisory decisions before the Administrative Board of Review.³⁰ The Administrative Board of Review is competent to review the substance of such acts by expressing an opinion and remitting the case back to the Supervisory Board for the preparation of a new draft decision. The new decision that would be adopted by the Governing Council can be subject to an action for annulment under Article 263 TFEU before the General Court.

Alongside supervisory decisions, the ECB holds the power to impose ‘administrative measures’ and ‘administrative penalties’, when a violation of the applicable legal requirements by natural or legal persons has been established.³¹ ‘Administrative penalties’ can be further divided³² into: (i) ‘administrative pecuniary penalties’ that apply in the supervisory context with respect to violations by a natural or legal person of requirements under directly applicable Union law;³³ and (ii) ‘fines’ and ‘periodic penalty payments’ that apply as a result of a breach of ECB regulations or decisions.³⁴ Clearly any measure falling under these categories would have binding legal effects *vis-à-vis* its addressee and therefore, can be challenged independently before Union courts.

The SSM Regulation confers upon the ECB the power to issue instructions on special issues pertaining to the supervision of banks which are addressed to the NCAs or private persons.³⁵ Such instructions appear in at least three kinds of situations. First, when the ECB issues specific supervisory instructions with regard to a significant supervisory entity.³⁶ Second, when the ECB issues general supervisory instructions typically but not exclusively with respect to less significant banks.³⁷ Third, where the ECB has a supervisory task but no relevant power.³⁸ There is little doubt of the mandatory nature of those instructions *vis-à-vis* the national authorities to which these are addressed, including NCAs of non-euro area Member States who participate in the Banking Union via the close cooperation framework.³⁹ The SSM Regulation expressly provides that the ECB can ‘require [NCAs], by way of instructions’⁴⁰ to carry out certain tasks and that NCAs must ‘follow’⁴¹ and ‘act on’⁴² such instructions.⁴³

Where it provides the basis for the adoption of a national act with binding effects, an ECB instruction could be regarded to have primary legal effects *vis-à-vis* the NCA and secondary legal effects for the addressee of the national act. The margin of discretion that national

³⁰ Article 24(1) SSM Regulation

³¹ The concept of ‘penalty’ here includes both ‘fines’ and ‘periodic penalty payments’ (for the latter see Articles 129-130 SSM Framework Regulation).

³² Article 120 SSM Framework Regulation.

³³ Article 18(1) SSM Regulation.

³⁴ Article 18(7) SSM Regulation and EU Regulation No 2532/98. Periodic penalties can apply only to legal persons; see Recital 36 SSM Regulation.

³⁵ See Articles 6(5)(a) and 18(5) SSM Regulation. With regard to the capacity of the ECB to issue instructions to NCAs of non-euro area Member States which participate in the Banking Union see Article 7(1) and (4) SSM Regulation.

³⁶ Article 6(3) SSM Regulation.

³⁷ Article 6(5) and Article 7(1) and (3) SSM Regulation.

³⁸ Article 9(1)(3) SSM Regulation and Article 2 SSM Framework Regulation.

³⁹ Article 108(5) SSM Framework Regulation. Also, Article 7(2)(b) and (c) SSM Regulation.

⁴⁰ Article 9(1) SSM Regulation.

⁴¹ Article 6(3) SSM Regulation.

⁴² Article 30(5) SSM Regulation.

⁴³ The general mandatory nature of ‘instructions’ is further confirmed in the light of the provisions guaranteeing the independence of the ECB and NCAs when acting as prudential supervisors (Article 19(1) SSM Regulation as well as the independence of the members of the Administrative Board of Review (Article 24(2) SSM Regulation. None of them must ‘take’ or ‘be bound’ by any instructions.

authorities enjoy in complying with the ECB's instruction would only play a role in assessing the standing of private parties. A person may be regarded to be directly concerned by the instruction of the ECB only where national authorities do not have autonomous decision-making powers with respect to the implementation of the ECB decision.⁴⁴ The level of discretion available to the national authority may depend *inter alia* on the degree of detail provided in the ECB instruction.⁴⁵ To the extent that the national authorities are regarded as having some discretionary decision-making powers,⁴⁶ the ECB instruction would be regarded as not being of direct concern to the final addressees, who therefore would likely not meet the standing requirements to bring a direct action against the ECB before Union courts.⁴⁷ In such cases, the validity of an ECB instruction could be contested only indirectly. The more common avenue would be to first bring an action before national courts and thereafter refer a question on the legality of the ECB instruction to the Court of Justice for a preliminary ruling under Article 267 TFEU.

Finally, there is little doubt that Opinions⁴⁸ and Recommendations⁴⁹ adopted by the ECB would only produce secondary legal effects *vis-à-vis* the parties affected by a final decision with binding force, provided that such a final act would indeed be adopted. This conclusion is based on the assumption that the acts in question are genuine opinions and recommendations, in the sense that a substantive assessment would not indicate that their normative content is aimed to be complied with by the respective addressees. If such a compliance is required, then a door may open for such acts to produce primary legal effects *vis-à-vis* their addressees and secondary legal effects for third parties.

3.2. 'Hard' cases

3.2.1. ECB instructions to national authorities involving application of national law

Pursuant to Article 4(3) SSM Regulation, the ECB can adopt acts in the form of instructions to the national authorities by applying national law. The partial harmonization in this policy area causes Union law to be complemented by national law.⁵⁰ In particular, Union law applies here in the form of Directives, which inevitably provides Member States with a margin of discretion with respect to their implementation, including the specification of their content. In our view, to the extent that such ECB instructions must be followed by national authorities, they clearly produce primary legal effects *vis-à-vis* their addressees. Equally, they are likely to produce

⁴⁴ The level of discretion exercised by the NCAs would also be relevant for determining whether a case of joined non-contractual liability under Article 340 TFEU may arise.

⁴⁵ See *inter alia* Arons T.M.C., 'Judicial protection of supervised credit institutions in the European Banking Union' in D. Busch, G. Ferrarini (eds.) *European Banking Union* (OUP, 2015), pp. 445-447. In Arons' opinion, if the ECB decision determines in detail which powers granted by national law have to be used and how those powers are to be used, the Court of Justice may have jurisdiction because there is no discretionary (material) decision-making left for the national supervisor.

⁴⁶ Given that the wording of Article 6(5)(a) SSM Regulation makes express reference to ECB instructions for 'groups or categories of credit institutions', it appears unlikely that there will be no discretionary decision-making left for the national authorities. C. Brescia Morra, 'The administrative and judicial review of decisions of the ECB in the supervisory field', Bank of Italy, Quaderni di Ricerca Giuridica, Scritti sull'Unione Bancaria, No 81, July 2016, p. 30.

⁴⁷ Op. cit., p. 28.

⁴⁸ E.g. Article 7(5) and (7) SSM Regulation.

⁴⁹ See e.g. ECB Recommendation of 13 December 2016 on dividend distribution policies (ECB/2016/44)

⁵⁰ M. Prek and S. Lefèvre, 'The EU Courts as "national" courts: National law in the EU Judicial Process, 54 Common Market Law Review (2017), p. 378-381, specifically, 380-381.

secondary legal effects *vis-à-vis* the persons affected by any subsequent national act adopted on the basis of the ECB instruction. The difficulty here is not as much whether the ECB instruction can produce legal effects, but in which judicial forum the action would have to be brought. While such acts are to be considered as reviewable, it would appear difficult for these ECB acts to be challenged via a direct annulment action by the persons affected by the final NCA decision. This is because NCAs would likely be left with some discretion on how to comply with the ECB instruction, which would therefore not be of direct concern to those persons. At the same time, it is doubtful that national courts have jurisdiction in such situations.⁵¹ All the same, the fact that the ECB instruction is based on national law which has been adopted for the purpose of transposing an EU directive has been argued not to affect the Court's jurisdiction to review the validity of such Union acts under Article 267 TFEU.⁵² The wording of Article 267(1)(b) TFEU expressly confers on the Court of Justice the jurisdiction to give preliminary rulings on 'the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.

3.2.2. Investigatory acts

The SSM Regulation confers on the ECB large investigatory powers *vis-à-vis* legal and natural persons,⁵³ including the power to carry out on-site inspections.⁵⁴ The initial trigger for commencing an investigation is held by the ECB,⁵⁵ if it suspects that a breach of relevant Union rules has occurred.⁵⁶ Thereafter, the case is referred to the investigation unit; an internal independent body which is empowered to carry out the investigations.⁵⁷ It is questionable whether acts or tasks carried out from the launch of the investigation and during the process leading to the adoption of an ECB final decision can be challenged independently before Union courts. The ECB's investigatory powers and applicable procedures mirror, to a significant extent, the ones that apply to the Commission in competition law infringement proceedings. Consequently, it can be argued that the principles governing the reviewability of acts adopted in the context of competition infringements could also apply *mutatis mutandis* with respect to investigations of violations under the SSM Regulation. The General Court has consistently held that '[o]nly measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment'.⁵⁸ In practice, it is more likely for such measures to be regarded as preparatory in nature, forming part of a wider administrative procedure and as such, they can be contested only in connection with and after

⁵¹ A. Witte, *The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?* 21(1) *Maastricht Journal of European and Comparative Law* (2014), p. 89-109, 108; M. Lamandini et al., *'The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law. Part 2: SSM, SRM and Fundamental Rights'* 23(2) *Columbia Journal of European Law* (2017), p. 199-263, 251.

⁵² C. Morra, *'The administrative and judicial review of decisions of the ECB in the supervisory field'*, p. 29. See also, A. Witte, *Op. cit.*, at p. 107.

⁵³ Articles 10 and 11 SSM Regulation.

⁵⁴ Articles 12 and 13 SSM Regulation.

⁵⁵ Article 11(2) SSM Regulation.

⁵⁶ Article 124 SSM Framework Regulation.

⁵⁷ Article 123(1) SSM Framework Regulation.

⁵⁸ See Case T-216/01R *Reisebank v. Commission* ('the Reisebank order'), EU:T:2001:277, para. 46; Case T-219/01R *Commerzbank v. Commission* ('the Commerzbank order'), EU:T:2001:278, para. 36; Case T-457/08 *Intel v. Commission*, para. 53. Also, A. Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008), pp. 84-86.

the final binding decision has been issued.⁵⁹ The intermediary measures can be regarded as producing primary legal effects of this type are not distinct and independent but are subsumed in the primary legal effects of the final decision.

Notwithstanding the above, there have been circumstances, where the Court has accepted to review directly the validity of intermediary acts, although the rationale is not always very clear or consistent. The Court may be inclined to accept to review such acts where an action against the final decision would not be sufficient to protect the applicant's legal position⁶⁰ or the intermediary measure has some kind of immediate and independent legal effect, which is distinct from the final decision.⁶¹ Applying the above principles to the tasks carried out in the field of prudential supervision, we suggest that decisions to hold a private oral hearing⁶² or affecting the right of a party to access the case file would likely not be considered as entailing independent and immediate legal effects *vis-à-vis* the investigated parties.⁶³ By contrast, decisions imposing on-site inspections on the business premises of persons⁶⁴ or rejecting a request for protection of a specific document under legal professional privilege⁶⁵ would most probably be considered as definitive in nature and producing independent effects from the final decision; hence, they would be reviewable under Article 263 TFEU. The final decision by which the ECB establishes a breach and potentially imposes an administrative penalty on a supervised entity is adopted by the Governing Council. Such a decision would clearly be regarded as producing binding legal effects *vis-à-vis* the investigated person and can be subject to an annulment action under Article 263 TFEU. By contrast, any prior draft decision of the Supervisory Board that is forwarded to the Governing Council would only have secondary legal effects *vis-à-vis* the addressee of the final decision, as it would merely provide the basis for the potential adoption of a separate binding decision.

3.2.3. Guidance to national authorities and private actors

The adoption of guidelines by the ECB Governing Council is a key rulemaking tool for the effective implementation of its tasks.⁶⁶ Such guidelines often comprise the basis on which the Executive Board implements monetary policy⁶⁷ or gives the necessary instructions to NCBs.⁶⁸ With regards to their legal effects, a question arises whether there is any difference between

⁵⁹ In Case T-219/01R *Commerzbank v. Commission*, para. 58, the General Court considered that a preparatory measure (in that case, the Commission's denial to access to documents), produced 'only limited effects', without, however clarifying this puzzling statement any further.

⁶⁰ See Case T-457/08R *Intel v. Commission*, EU:T:2009:18, para. 53.

⁶¹ Joined Cases T-264/10 and T-266/10 *Spain v. Commission*, EU:T:2012:315, para. 11-12; Case T-251/13 *Gemeente Nijmegen v. Commission*, EU:T:2015:142, para. 43; Case T-87/09 *Andersen v. Commission*, EU:T:2009:468, para. 56.

⁶² Article 126(3) SSM Framework Regulation.

⁶³ Articles 126(4) and 32 SSM Framework Regulation. See by analogy the General Court's findings in the context of competition law proceedings: Case T-219/01R *Commerzbank v Commission*, para. 53, 58 and 63; Case T-457/08 *Intel v. Commission*, EU:T:2009:18, para. 56.

⁶⁴ Article 12 SSM Regulation. Article 13(2) SSM Regulation expressly provides that the ECB decision to carry out on-site inspections are subject to review by the CJEU.

⁶⁵ Case T-125/03 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, EU:T:2007:287, para. 48 and 53

⁶⁶ Article 12.1 ESCB Statute and Article 17.2 ECB Rules of Procedure.

⁶⁷ See e.g. ECB Guideline on monetary policy instruments and procedures of the Eurosystem (ECB/2000/7), OJ L310/11 of 11.12.2000.

⁶⁸ Articles 12.1, 32.2 and 32.6 ESCB Statute.

‘guidelines’ and ‘instructions’⁶⁹ adopted by the ECB and addressed to national authorities. Article 14.3 ESCB Statute expressly provides that the NCBs, when acting within the ESCB, are under an obligation to ‘act in accordance with the guidelines and instructions of the ECB’. The same provision also confers on the ECB the power to take the necessary steps to ensure the NCBs’ compliance with its guidelines and instructions. More importantly, ECB guidelines often use mandatory language,⁷⁰ particularly in the field of monetary policy, which is similar to the one normally found in instructions. In the context of bank supervision, any non-euro area Member State wishing to participate to the Banking Union is obliged to notify that its national authorities ‘will abide by any guidelines or requests issued by the ECB’.⁷¹ On this basis, there may be a case in favour of treating such guidelines in the same way as instructions with respect of their capacity to produce primary legal effects *vis-à-vis* their addressees. Having said that, the case in favour of ECB guidelines having binding force has its weaknesses. Unlike what occurs with respect to decisions and regulations, the current legal framework does not confer on the ECB the power to initiate infringement proceedings and impose sanctions for breach of its guidelines. Yet, our conceptual framework implies that, whilst the provision of sanctions for breach of an act would normally indicate the capacity of that act to produce binding legal effects, the opposite is not true.⁷² Whether an act can produce legal effects, whether primary or secondary, ultimately stems from its ability to cause a change in the legal position of a person, a finding to be determined on the basis of a substantive test.

In light of the existence of various types of instruments used by the ECB to provide ‘guidance’, determining whether an instrument can be characterised as ‘guideline’ or ‘instruction’ is not always a simple exercise. In fact, it is possible to divide ECB guidance-related instruments into two broad categories. The first category entails formal instruments entitled ‘Guidelines’, which are published in the Official Journal.⁷³ The second category consists of various types of documents available on the ECB’s website, by which the ECB provides guidance to national authorities and the private sector. We have identified four types of that second category of instruments. First, the ECB issues communications to the banking industry on special issues pertaining to its supervisory tasks. These often take the form of ‘public guidance’,⁷⁴ by which the ECB clarifies or further specifies the manner in which competences are to be exercised, or rules be interpreted and implemented. Such instruments do not contain an express statement clarifying their legal force, however, they do normally state that the ‘ECB recommends that entities follow this Guidance’.⁷⁵ Second, there are instruments appearing in the form of ‘guides’.⁷⁶ These are addressed to the banking sector and provide details for compliance with their regulatory requirements. Some guides include an express statement with respect to their

⁶⁹ Pursuant to Article 12.2 ESCB Statute and Article 17.6 ECB Rules of Procedure, instructions are adopted by the Executive Board.

⁷⁰ ECB Guideline 2015/510 on the implementation of the Eurosystem monetary policy framework, OJ L 91/3 of 2.4.2015.

⁷¹ Article 7(2)(b) SSM Regulation.

⁷² Joined Cases C-463/10 P and C-475/10 *Deutsche Post and Germany v. Commission*, para. 48.

⁷³ E.g. ECB Guidelines 2017/697 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9), OJ L 101/156 of 13.4.2017.

⁷⁴ See e.g. ECB public guidance on information on transactions which go beyond the contractual obligations of a sponsor institution or an originator institution under Article 248(1) of Regulation (EU) No 575/2013 (28 July 2017); ECB public guidance on the review of the qualification of capital instruments as Additional Tier 1 and Tier 2 instruments (6 June 2016); ECB public guidance on the recognition of significant credit risk transfer (24 March 2016).

⁷⁵ *Op. cit.*

⁷⁶ ECB Guide for the Targeted Review of Internal Models (TRIM), February 2017.

legal force,⁷⁷ whilst others are vague on whether there is an intention to produce legal effects.⁷⁸ Third, further obscurity arises from another series of documents, not only because they are silent regarding their legal force, but also due to their inherent features rendering their classification even more difficult. A prominent example of this type of instruments are letters that are forwarded by the ECB to private entities, such as letters of the Supervisory Board which are addressed to the management of credit institutions. The content of these letters varies widely from providing clarification on their legal requirements⁷⁹ to underlying the need to take specific steps in complying with the legal framework.⁸⁰ Finally, there are acts published in the form of ‘communications’, which outline details pertaining to interpretation of Union rules.⁸¹ A substantive assessment, where the language used is likely to play an important role, would determine whether such communication instruments express mere opinions⁸² or impose an obligation *vis-à-vis* national authorities or private parties to apply specific interpretation of Union rules.

In the light of the variety of ECB instruments providing guidance, it is not clear whether the provisions in the SSM Regulation and SSM Framework Regulation making reference to ECB ‘guidelines’ should be interpreted narrowly as covering only the ‘guidelines’ formally published in the Official Journal or more broadly to include all the above types of ECB instruments involving guidance. The first option endorses a formalistic interpretation, while the second invites a substantive reading of the term ‘guidelines’. In our opinion, the case for a strict interpretation of the term ‘guidelines’ seems to be stronger. As mentioned above, the legislator does not leave any doubt in respect of the binding effects of instruments described as guidelines under the SSM’s legal framework. If all types of guidance-related instruments were regarded *a priori* as capable of producing such legal effects, this would have paradoxical effects. First, it would be unnecessary to apply a substantive test for determining the legal effects of any instrument whose content involved the provision of guidance. Second, it would effectively prevent the ECB from adopting guidance-related instruments with no binding effects. Consequently, we take the view that only guidelines that are formally published in the Official Journal have *a priori* primary legal effects *vis-à-vis* the national authorities to which they are addressed. Furthermore, where guidelines impose limits to the ECB’s discretion, they are capable of producing primary legal effects *vis-à-vis* the ECB to the extent that they require from the ECB to put forward valid reasons to depart from them.⁸³ The legal effects of the non-formally published guidance documents, would be determined on the basis of a substantive test. The language used by the ECB would be taken into account, particularly whether the wording implies an intention to impose mandatory requirements. Any decisions adopted at

⁷⁷ ECB Guide to banking supervision, November 2014, p. 5. A similar statement is included in ECB Guide to fit and proper assessments, May 2017, p.3; and ECB Guide on options and discretions available in Union law, March 2016, p. 3. By contrast, the ECB Addendum to the ECB Guide on options and discretions available in Union law, August 2016 states nothing with respect to its legal force.

⁷⁸ Letter by Korbinian Ibel, Director General of the DG Microprudential Supervision IV (February 2017).

⁷⁹ See Letter by the Secretariat to the Supervisory Board of 31 March 2017, ‘Additional clarification regarding the ECB’s competence to exercise supervisory powers granted under national law’ (SSM/2017/0140).

⁸⁰ See Letter by the Chair of the Supervisory Board of 13 December 2016, ‘Variable remuneration policy’.

⁸¹ See Treatment of central bank reserves with regard to the Liquidity Coverage Requirement (LCR): Common understanding between the ECB and National Competent Authorities (30 September 2015).

⁸² See Case 151/88 *Italy v Commission*, EU:C:1989:201, para. 22; Case C-308/95 *Netherlands v. Commission*, EU:C:1999:477, para. 27–29; Case T-234/04 *Netherlands v. Commission*, EU:T:2007:335, para. 61; Case C-163/06P *Finland v. Commission* EU:C:2007:371, para. 40–41; Cases T-393/06R I, T-393/06R II and T-393/06 R III *Makhteshim-Agan Holding BV and Others v. Commission*, EU:T:2007:104, para. 40

⁸³ See by analogy to Commission Guidelines, Case C-171/00P *Libéros v. Commission*, EU:C:2002:17, para. 35; Joined Cases C-189/02 P etc. *Dansk Rørindustri and others v. Commission*, EU:C:2005:408, para. 210; Case C-526/14 *Kotnik*, EU:C:2016:570, para. 40–41.

national level which are based on ECB instruments providing guidance would likely trigger the latter's capacity to produce secondary legal effects *vis-à-vis* private parties; hence enabling the Court to review their validity pursuant to Article 267 TFEU.

4. Conclusion

The purpose of this article was to offer a conceptual framework, which allows a clear and transparent assessment of the legal/judicial accountability of acts adopted within the SSM based on an evaluation of their legal effects. Based on this framework, we have shown that the Union courts are the relevant judicial forum to hold the ECB to account for acts, which have primary legal effects, that is all acts or omissions which, directly or indirectly, are capable of determining of rights or imposing obligations. Such acts can be challenged by way of direct actions under Articles 263 and 265 TFEU. The main hurdle for private parties to access this forum lies, however, in the challenging standing criteria of Article 263(4) TFEU.

Where private parties do not meet the standing criteria in Articles 263(4) TFEU, or in case of an act that merely produces secondary legal effects (but not primary legal effects) only indirect judicial review via Articles 267 and 277 TFEU is available. Private parties, for example, are not directly concerned by a (binding) ECB instruction addressed to a national authority, which has discretion in its application. Mere secondary legal effects occur, for example, in case of an ECB guideline that, based on a substantive assessment, does not have any binding force, but is addressed to a national authority. In this case the national court will be the relevant forum for judicial accountability of the national authority's act, with the Court of Justice providing an incidental forum for the review of the ECB's guideline on a reference under Article 267 TFEU.

The judicial accountability mechanisms within the SSM therefore mirror the allocation of competences between the national authorities and the ECB within the SSM by providing for a separate but integrated system of judicial review. The conceptual framework proposed in this article is intended to help determine the relevant forum and ensure judicial protection guaranteed in Article 47 of the Charter of Fundamental Rights.